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In the Supreme Court of the United States

OCTOBER TERM, 1982

MISSION INSURANCE COMPANY

Petitioner

Versus

UNITED STATES OF AMERICA

Respondent

BRIEF OF AMICUS CURIAE WATER QUALITY INSURANCE SYNDICATE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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UNITED STATES OF AMERICA

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BRIEF OF AMICUS CURIAE WATER QUALITY INSURANCE SYNDICATE IN SUPPORT OF MISSION INSURANCE COMPANY'S PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Amicus Curiae Water Quality Insurance Syndicate respectfully joins Petitioner, Mission Insurance Company, in praying that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on July 30, 1982.

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STATEMENT OF THE ISSUE

Is the government's remedy under 33 U.S.C. §1321 (g) for pollution clean-up expenses against third parties whose simple negligence is the sole cause of the discharge of oil or other hazardous substances into the navigable waters of the United States an exclusive remedy, precluding resort to a general maritime law tort remedy which circumvents the FWPCA's tonnage limits?

STATEMENT OF INTEREST OF AMICUS CURIAE

Water Quality Insurance Syndicate (WQIS) is a group of major American and European companies which have formed a syndicate to insure the liabilities of American vessel owners and operators under the Federal Water Pollution Control Act (FWPCA). WQIS insures the great majority of American river and harbor craft against FWPCA and general maritime tort liability for pollution damage.

The decision of July 30, 1982 by the United States Court of Appeals, Fifth Circuit, in *United States vs. M/V BIG SAM, in rem,* et al, (hereafter "BIG SAM"), 681 F.2d 432 (5th Cir. 1982) rehearing denied December 13, 1982, 693 F.2d 451 (5th Cir. 1982), restricts the exclusivity of FWPCA to subsection (f) of 33 U.S.C. §1321, i.e., to discharging vessel owners and operators, and denies exclusivity to subsection (g), thus making available to the government a general maritime tort remedy against third party sole fault non-discharging vessel owners and operators, depriving them of the tonnage limitation of liability of the FWPCA. WQIS has a vital interest in this litigation because of the increased exposure under its policies resulting from the decision in the captioned case.

The impact of BIG SAM on insurers under the FWPCA is compounded by the difficulty which the lower courts have experienced in defining the term "third party", particularly in towage situations. Under the present state of the law it is not possible for pollution insurers and their assureds to define the parameters of their exposure for clean-up costs, a situation which Justice Rehnquist describes, in his dissent to the denial of certiorari in *Hollywood Marine, Inc. and Water Quality Insurance Syndicate v. United States*, 451 U.S. 994 (1981), as justifying "the Court granting certiorari and giving the issue plenary consideration at this time".

SUMMARY OF ARGUMENT

1.

The Court of Appeals has adopted a theory of unlimited liability based on simple negligence which was considered and rejected by Congress.

2.

Subsection (h) of 33 U.S.C. §1321 can be interpreted to serve three separate and distinct purposes without ignoring the tonnage limitation of subsection (g) as is done by BIG SAM.

3.

By refusing to interpret subsections (f) and (g) as providing similar exclusive remedies in the absence of willful negligence, BIG SAM has created uncertain cleanup liabilities for insureds and insurers in collision and towage situations.

ARGUMENT

In the wake of the Torrey Canyon disaster in 1967 and the Santa Barbara oil spill in 1969, the Congress undertook to draft legislation which would serve the public need for petroleum products as well as the public need for protection of the environment. The Federal Water Quality Improvement Act of 1970 amended and was incorporated within the Federal Water Pollution Act of 1948, 33 U.S.C. §1161 (1970). This legislation was amended by the Federal Water Pollution Control Act amendments of 1972 (FWPCA) 33 U.S.C. §1251, *et seq.* The subsections of this legislation which are relevant to this case are 33 U.S.C. §1321(f), (g) and (h).

The legislative history of these sections reflects a careful balancing of competing interests, the most critical aspect of which is the extension of the tonnage limitation and the elimination of an inconsistent general maritime law remedy. Congress' decision to amend the FWPCA in 1972 was motivated by its recognition that existing statutory and federal maritime law was inadequate to preserve the integrity of U.S. waters.[1] In drafting the FWPCA amendments, Congress was acutely aware of two competing interests, both vital to the nation's prosperity: (1) the need for clean water, and (2) the need for oil. Overzealous devotion to either interest detracts from the other, possibly with disastrous consequences. The nation could best obtain clean water at no expense to the government by imposing upon the shipping industry full responsibility for costs of cleanup. The result undoubtedly would be a shortage of oil occasioned by the inability of many carriers to stay in business under economically burdensome conditions,

[1] 116 Cong. Rec. 9332 (1970); 3 EPA Legal Compilation 1995 (1973).

or exorbitantly expensive oil priced to defray the costs of unlimited clean-up responsibility. The public would then share the cost of oil spills indirectly through higher prices at the pump. The statute which ultimately was enacted represents a compromise between the two competing needs of the nation.

The legislative history shows that Congress decided that these competing needs could best be harmonized through legislation which struck a reasonable balance by guaranteeing the government some recoupment of cleanup costs in all cases by permitting recovery without the need of proving negligence. The *quid pro quo* for strict liability was a tonnage limit on that liability unless willful negligence caused the spill. In reaching this conclusion, Congress considered four factors:

> (1) [T]he effect of to rigid a liability test on maritime commerce; (2) the availability of insurance for any specific amount or type of liability; (3) the economic impact of any specific amount of liability on the owner of the vessel, the shipper of the oil and the consumer; and (4) the impact of a burdensome liability test on the U.S. Government and the people of the United States. Report of Senate Committee on Public Works No. 911-351, 91st Cong., 1st Sess. (1969) at p. 5.

These factors demonstrate that, although Congress did not wish to unduly burden the public sector, it wished to avoid crippling the shipping industry which serves a vital public need.

Congress considered four different approaches to cleanup expenses:

(1) Absolute liability with unlimited recovery;
(2) Liability predicated on negligence with limited recovery;
(3) Liability predicated on negligence with unlimited recovery; and
(4) Absolute liability with limited recovery.

Congress selected a modification of the fourth approach which accorded the government the right to collect cleanup costs (within the defined limits of liability) without having to prove that negligence caused the spill and which furnished dischargers and third parties four avenues of escape—an approach Congress deemed the best available and most utilitarian. The limited liability aspect of the bill was crucial to its enactment as reflected in the words of Senator Cooper:

> Consistent with the philosophy of absolute liability, limits of liability are provided. This is an important provision, which I consider draws a proper balance between the public interest and the ability of private enterprise to respond. I think it should be pointed out that the provision was adopted only after the most careful consideration and thorough study. 116 Cong. Rec. 9003 (1970); 3 EPA Legal Compilation 1967 (1973).

Congress recognized that any other approach placed too great a demand on the private sector which inevitably would visit a reciprocal disadvantage on the public sector in the form of lack of oil or unaffordably high oil prices. The burden on the private sector is the same regardless of whether the responsible party is the subsection (f) discharger or the subsection (g) third party.

Because a statute should be given a meaning which

carries out its purpose[2] and because, conversely, a statute should not be construed in a manner which frustrates its clear-cut purpose,[3] subsection (g) should be interpreted to effectuate Congress' intent to strike a proper balance. *United States vs. Dixie Carriers, Inc.*, 627 F.2d 736 (5th Cir. 1980), and *Steuart Transp. Co. vs. Allied Towing Corp.*, 596 F.2d 609 (1st Cir. 1979), found that subsection (f) must be interpreted to be the exclusive remedy because to do otherwise would upset that balance. Because subsections (f) and (g) are virtually identical, there is no compelling reason to justify an interpretation of subsection (g) inconsistent with *Dixie Carriers* and subsection (f) and which would patently upset the balance intended by Congress.

THE COURT OF APPEALS HAS ADOPTED A THEORY OF UNLIMITED LIABILITY BASED ON SIMPLE NEGLIGENCE WHICH WAS CONSIDERED AND REJECTED BY THE CONGRESS.

The FWPCA's legislative history reflects a clearly articulated balance of competing interests. Congress specifically considered the option of providing for strict liability with accompanying tonnage limits when fault could not be established and tort liability with unlimited recovery if fault could be established. Congress' rejection of that approach ought to preclude an interpretation of the FWPCA producing that precise result, but that rejected approach is precisely what BIG SAM adopts.

U.S. v. Dixie Carriers, Inc., supra, relying on the

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[2] *United States v. State of Maryland*, 349 F.2d 693, 695 (D.C. Cir. 1965).

[3] *First National Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 261; 87 S.Ct. 492, 497 (1966).

same legislative history, recognized that subsection (f) was an exclusive remedy. Subsection (g) is descended from the same lineage as subsection (f), and must be likewise an exclusive remedy.

The choice of absolute liability with limited recovery was not easily made. The form which the FWPCA finally assumed resulted from extensive legislative debate, disagreement and compromise.[4] The House and the Senate initially were unable to agree and a conference of members from the Senate and the House was appointed to hammer out a compromise.

When Congress first considered pollution cleanup legislation, the House and the Senate chose divergent paths. The House bill allowed recovery upon a showing of simple negligence, and reversed the burden of proof. No reference to third parties appeared in the bill. The Senate bill was similar to the bill ultimately enacted. It imposed strict liability with tonnage limits, but allowed *unlimited* recovery upon a showing of *simple* negligence.[5] §12(f)(l) of the Senate bill was aimed only at the discharger and created the same four avenues of escape that are found in the statute as enacted, including the act or omission of a third party irrespective of fault. The Senate bill did not address the impact of a sole-cause third party, did not substitute such a third party for the discharger and consequently did not contain a parallel to subsection (g) of the FWPCA. The Senate bill did, however, have a provision

[4] See, *e.g.*, 116 Cong. Rec. 8984 (1970); 3 EPA Legal Compilation 1966 (1973).

[5] See §12(f)(l) of the Senate bill which corresponds to subsection (f) of the FWPCA. The relevant portions of §12(f)(l) are found in Appendix A *infra*.

similar to subsection (h).[6]

Since neither §12(f)(l) nor any other provision of the Senate bill regulated the government's claim against third parties, the Senate bill did not have exclusivity impact on the government's general maritime law tort remedy against third parties. §12(l) (subsection (h)'s counterpart), therefore, was not and could not have been designed to preserve remedies otherwise excluded. Rather §12(l) could only have been designed to confirm that the statute did not exclude remedies and causes of action not addressed in the liability portion of the statute, *i.e.*, §12(f)(l).

When the FWPCA amendments emerged from conference, the bill ultimately enacted retained the Senate bill's strict liability feature, granted unlimited recovery but only for willful negligence and added subsection (g) to substitute a sole-cause third party, who otherwise would go unscathed if without fault, for the discharger. §12(l) of the Senate bill was retained as subsection (h), and, like its counterpart, was designed to confirm that the statute did not exclude remedies and causes of action that were not addressed in the liability portion of the statute, *i.e.*, subsections (f) and (g). Consequently, the legislative history of subsection (h), as manifested in the evolution of the statute, does not support the BIG SAM panel's statement that the "legislative history...affords no reason not to read this statute according to its unambiguous expression." 681 F.2d at 442. To the contrary, the evolution of subsection (h) strongly suggests that it serves only to preserve remedies that are *not* addressed in subsection (g).

Where the final version of a bill rejects the approach

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[6] See §12(l) which is quoted in the BIG SAM opinion, 681 F.2d at 443.

taken in an earlier draft, courts have refused to adopt an interpretation which adheres to the rejected language, observing that the rejection "strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). See also *Pan American World Airways, Inc. v. C.A.B.*, 380 F.2d 770 (2d Cir. 1967), where, in considering a statute which also resulted from conference, the Court stated:

> We do not agree. That Congress has adopted the House version of the bill, specifically rejecting the Senate's conflicting version, is of course an extremely significant factor in determining what was Congress' intention with respect to the matters in issue. It would be foolish indeed to disregard the one source of legislative history that explains the reasons for the conference committee's action. (citations omitted) 380 F.2d at 781.

Because Congress rejected the Senate's approach, the *Gulf Oil* and *Pan American* decisions preclude the BIG SAM interpretation which reinstates the rejected Senate approach.

SUBSECTION (h) CAN BE INTERPRETED TO SERVE THREE SEPARATE AND DISTINCT PURPOSES WITHOUT IGNORING THE TONNAGE LIMITATION OF SUBSECTION (g).

To give effect to subsection (h) the panel in BIG SAM concluded that, as to third parties, subsection (g) has no meaning.

It is respectfully submitted that the Court's "single-

minded focus on the language of subsection (h)"[7] does unnecessary violence to the statute. Subsection (h) can be read in relation to subsection (g) and both can be given meaning. The concept of exclusivity articulated in *U.S. v. Dixie Carriers, Inc., supra*, the linguistic and conceptual identity of subsections (f) and (g), and the canons of statutory construction can be adhered to by reading subsection (h) as serving one or more of the following purposes which do not negate subsection (g):

> First—Subsection (h) preserves the government's remedies against third parties for damages other than cleanup costs (e.g., oil spill damage to government property).
>
> Second—Subsection (h) preserves the government's remedies for abatement of a nuisance.
>
> Third—Subsection (h) permits the government to join in one suit all potentially responsible parties—dischargers, third parties and, if indicated, fourth parties—thereby avoiding a proliferation of litigation which overly burdens the courts.

The first suggestion is based upon the distinction between cleanup costs and property damage. Subsection (h) makes it clear that the government may proceed against a third party to recover any physical damages to government property which the government may sustain as the result of an oil spill.

The second suggestion recognizes that there may be instances in which continuing behavior results in spillage.

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[7] The quoted language is taken from the dissent of Judges Gee, Brown, Rubin and Jolly to the Fifth Circuit's denial of a Rehearing en Banc. 693 F.2d at 459.

Subsection (h) preserves the government's right to seek injunctive relief against third parties to abate a nuisance.

The third suggestion is procedural and avoids a potentially endless litigation wherein the government may first proceed against the discharging vessel only to find that a third party caused the spill and then may bring a second suit or amend its complaint to bring in the third party only to find that a fourth party was the cause and so on. *United States v. LeBoeuf Bros. Towing Co.*, 621 F.2d 787 (5th Cir. 1980), suggests that subsection (f) requires the government to proceed first against the discharging vessel alone. Indeed a literal reading of the statute requires this conclusion. Subsection (h) permits the government to name all potentially responsible parties in one litigation.

BY REFUSING TO INTERPRET SUBSECTIONS (f) AND (g) AS PROVIDING SIMILAR EXCLUSIVE REMEDIES IN THE ABSENCE OF WILLFUL NEGLIGENCE, BIG SAM HAS CREATED UNCERTAIN CLEAN-UP LIABILITIES FOR INSUREDS AND INSURERS IN COLLISION AND TOWAGE SITUATIONS.

By differentiating between the protection afforded by subsection (f) and subsection (g), BIG SAM has created uncertainty and confusion never intended by Congress. The difference BIG SAM creates between the two subsections highlights the confusion in the decisions of the lower courts in defining the term "third party" in subsections (f), (g) and (h). The decisions of the lower courts relating to whether the tower of a spilling vessel is a third party presented serious difficulties even before BIG SAM. The difficulties are now compounded, for under BIG SAM the consequences to the towing vesel categorized as a third party result in unlimited liability for clean-up costs even

though the towing vessel is not guilty of willful negligence. The decisions of the lower courts create anomalies only this court can resolve.

In *Complaint of Tug OCEAN PRINCE, INC., et al. v. United States*, 436 F.Supp. 907, 923,24 (S.D.N.Y. 1977), affirmed in part, reversed in part on other grounds, 584 F.2d 1151 (2nd Cir. 1978), certiorari denied, 440 U.S. 959 (1979), it was held that the towing vessel is a "third party" for purposes of the discharging vessel's subsection 1321 (f)(l) defense. However, in *United States v. LeBeouf Bros. Towing Co., Inc.*, 621 F.2d 787 (5th Cir. 1980), the Fifth Circuit held that the towing vessel is not a "third party" whose sole fault relieves the discharging barge of liability under subsection (f). Further confusion is found in *The Matter of the Complaint of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc.*, decided by U.S. District Court for the Southern District of New York, [Memorandum Opinion and Order of February 11, 1983; 78 Civ. 3552 (ADS)][8], in which the tug GRACE MORAN caused the grounding and total loss of the dredge PENNSYLVANIA. In a suit by the United States for clean-up costs, the court said:

> Moran is undoubtedly a third-party under subsection (h)(2). As detailed in opinions by the Fifth and First Circuit a narrow reading of the sole-cause "third-party" exception in subsection 1321 (f) is justified by the statute's purpose of assuring government reimbursement for clean-up costs by holding discharging vessels strictly liable. See United States v. LeBeouf Bros. Towing Co., 621 F.2d 787 (5th Cir.) rehearing denied, 629 F.2d 1350 (1980), certiorari denied, 452 U.S. 906 (1981); Burgess v. M/V TAMANO, 564 F.2d

[8] The decision is reproduced in Appendix B *infra*.

> 964, 981-82 (1st Cir. 1977), certiorari denied, 435 U.S. 941 (1978). This purpose is not served by narrowly construing the reference to "third party" in subsection 1321 (h)(2); rather, a broad construction of the term in subsection (h)(2) serves the purpose of the statute in the same way a narrow reading of the term in subsection (f) does: by providing another source from which the government may attempt to procure reimbursement for clean-up expenses. (See Appendix B at A-11 *infra*)

The insurance industry is entitled to know, at the very least, what the term "third party" means and whether it means different things under different sections of the same statute.

The confusion in the decisions of the lower courts' interpreting the third-party defense in subsection (f) can best be resolved by this Court. BIG SAM injects added urgency into the need for clarification. To delay a resolution of this conflict only causes the shipping and insurance industries to incur added legal expenses which are ultimately borne by the taxpayer.

In *U.S. v. Hollywood Marine, Inc., et al.*, 625 F.2d 524 (5th Cir. 1980), cert. den. 451 U.S. 994 (1981), certiorari was denied in a case in which the Fifth Circuit Court of Appeals, consistent with its *LeBeouf* opinion, 621 F.2d 787 (1980), concluded that the towing vessel was not a third party for purposes of the spilling vessel's §1321 (f) (l) defense. In dissenting from the denial of certiorari, Justice Rehnquist observed:

> Insurance policies and contracts, unlike actual collisions, are frequently matters which are entered into consensually for a period of months

> or years in reliance upon one or another construction of applicable law. This factor is sufficiently important that when combined with the recognized importance of the enterprise being conducted and the evil at which the legislation is aimed to justify the Court granting certiorari and giving the issue plenary consideration at this time.

The purposes which Congress intended in enacting FWPCA will be substantially advanced if this Court resolves the anomaly so clearly apparent in BIG SAM.

CONCLUSION

BIG SAM, in ignoring the tonnage limitation of subsection (g), destroys the balance intended by Congress in making the subsection (g) third party the surrogate of the subsection (f) spilling vessel. The impact of BIG SAM is compounded by the difficulties which the lower courts have experienced in deciding who is and who is not a third party. The compelling need for clarification by this Court is apparent.

RESPECTFULLY SUBMITTED,

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APPENDIX "A"

Section 12(f)(l) of the Senate bill which corresponds to 33 U.S.C. §1321(f):

> Except where an owner or operator can prove that a discharge was caused solely by (a) an act of God, (b) an act of war, (c) negligence on the part of the United States Government, or (d) an act of third party, such owner or operator of any vessel from which oil is discharged, or which causes the discharge of oil...shall, notwithstanding any other provision of law, be liable to the United States Government for the actual cost incurred under subsection (e) for the removal of such oil by the United States Government in an amount not to exceed $125 per gross ton of such vessel or $14 million, whichever is lesser, except that where such discharge was the result of negligence or a willful act, such owner or operator shall be liable to the United States Government for the full amount of such costs. Report of Senate Committee on Public Works No. 91-351 at p. 105 (1969).

APPENDIX "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter

of

MEMORANDUM OPINION
AND ORDER
78 Civ. 3552(ADS)

The Complaint of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., Inc., as Owner and Bareboat Charterer, Respectively of Tug GRACE MORAN, for Exoneration from or Limitation of Liability.

(Filed Feb. 14, 1983)

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ABRAHAM D. SOFAER, D.J.:

On July 31, 1978 the tug *Grace Moran* and its tow the dredge *Pennsylvania* ran aground on a shoal off rockaway Point known as Louie's Hump. The *Pennsylvania* subsequently sank and became a total loss. Members of its crew allegedly suffered personal injuries, and the United States spent $235,000 to clean-up oil which spilled from the dredge's fuel tanks. Following ten days of trial and one day of argument, this Court denied a petition to exonerate or limit the liability of Berkley Curtis Bay Co. and Moran Towing & Transportation Co., respectively the owner and the bareboat charterer of the *Grace Moran* (hereinafter collectively referred to as "Moran"). The Court further found Moran 65% at fault and American Dredging Company (hereinafter "ADC"), the owner of the dredge *Pennsylvania*, 35% at fault for all damages resulting from the accident, including the expenses incurred by the United States in cleaning up the oil spill.

Following appeals by the various parties, the case has been remanded by the Second Circuit for two purposes: first, to determine whether ADC may claim that Moran's breach of a warranty of workmanlike service ("WOWS") precludes ADC liability and, if so, whether that claim has merit; second, to clarify whether and to what extent Moran

may be held liable for the government's oil-spill cleanup expenses under § 1321 of the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1321.

I.

ADC's claim concerning Moran's breach of WOWS was not preserved in the form that it was asserted on appeal. ADC did not claim at trial that Moran's breach entitled it to recover irrespective of its own negligence. This Court—and all the parties including ADC—treated the breach of WOWS claim during and after the trial as an additional argument against Moran's petition to avoid or limit its liability. The Court found Moran liable without limitation on other grounds and, accordingly, did not mention the WOWS claim in its oral opinion. Although the Court invited corrections to its opinion, ADC did not object to the Court's failure to divine ADC's allegedly broader purpose from its pretrial submissions. *See Desert Palace, Inc. v. Salisbury,* 401 F.2d 320, 323-24 (7th Cir. 1968).

Appeals based on "claims and defenses that were pleaded but not properly pursued in the trial court" should not be allowed "except in the most extraordinary circumstances to prevent a miscarriage of justice." *Broadway Delivery Corp. v. United Parcel Service,* 651 F.2d 122, 126 (2d Cir. 1981). There is no miscarriage of justice in not allowing ADC to attempt to avoid liability for its share of fault for the damages in this case.

ADC's assertion that Moran's breach of WOWS precludes ADC liability is tenuous under existing law. In *Fairmont Shipping Corp. v. Chevron International Oil Co., Inc.,* 511 F.2d 1252, 1260 (2d Cir. 1975) the Second Circuit

suggested that a tow could not be held liable for contributory negligence (short of "active hindrance") once it was established that damages had been caused in part by a tug's breach of WOWS. In *Navieros Oceanikos, S.A. v. S.T. Mobile Trader,* 554 F.2d 43, 46-47 (2d Cir. 1977), however, the Circuit Court held that a breach of WOWS does not generally preclude consideration of a plaintiff's contributory negligence. *Navieros* did suggest in dicta that, where personal injury damages exposed a plaintiff to liability without fault under the unseaworthiness doctrine, WOWS doctrine might require indemnification regardless of the plaintiff's own fault. 554 F.2d at 46-47; *see Gaymon v. Prudential Lines, Inc.,* 473 F.Supp. 161, 164-65 (S.D.N.Y. 1979). ADC's reliance on this suggestion in *Navieros* is questionable, however, given recent developments in maritime law. The fact that ADC might be strictly liable to injured seamen hardly justifies a rule that would allow it to avoid completely its own fault. The Supreme Court's decision in *United States v. Reliable Transfer Co.,* 421 U.S. 397 (1975) plainly condemns such a rule by its emphatic declaration that damages in admiralty should be allocated in accordance with fault. 421 U.S. at 410-11; *see Hanover Insurance Co. v. Puerto Rico Lightrage Co.,* 553 F.2d 728, 730 & n.3 (1st Cir. 1977); Note, *Towage Accidents and the Implied Warranty of Workmanlike Service: A New Strict Liability?,* 10 Ga. L. Rev. 794, 815 (1976).

The nature of ADC's faults, moreover, makes ADC's possible avoidance of its share of liability particularly unjust. Under the WOWS indemnity theory urged by ADC, ADC could be held liable only if its faults constituted "active hindrance." The seriously negligent omissions of ADC do not appear to constitute "active hindrance" as that concept has been interpreted. *See Rodriguez v. Olaf Peder-*

sen's Rederi A/S, 527 F.2d 1282 (2d Cir. 1975), *cert. denied*, 425 U.S. 951 (1976); *Albanese v. N.V. Nederlande Amerik Stoomy. Maats*, 346 F.2d 481 (2d Cir.), *rev'd on other grounds*, 382 U.S. 283 (1965). But ADC's omissions may have had even more serious consequences than many forms of "active hindrance"; its omissions (*i.e.* the crew's failure to warn of the shoal and of the need to prevent resumption of tow as well as the dredge's open doors and lack of compartments) made what would have been a serious accident into an unsalvageable disaster. Moreover, the dredge was unseaworthy because of its lack of a valid certificate for oceangoing operations under 46 CFR § 90.05-25. This omission constituted a statutory violation, and the Second Circuit has emphasized that limitations on liability resulting from such violations are strongly disfavored. *Tug Ocean Prince, Inc. v. United States*, 584 F.2d 1151, 1160 (2d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

In sum, ADC did not properly preserve the issue of WOWS indemnification at trial, and a miscarriage of justice will not occur by denying ADC the right to raise this issue at this time. Current law is unlikely to sanction WOWS indemnification, and, in any event, such indemnification would lead to a particularly unjust result given ADC's various omissions, including its failure to obtain a valid certificate for oceangoing operations.

II.

At trial the Court held Moran liable to the government for its share of the United States' oil-spill cleanup expenses under § 1321(g) of the FWPCA. Subsection (g), which the government urged at trial as the appropriate provision, applies only to sole-cause, third (*i.e.* non-

discharging) parties. Moran was held only 65% at fault for the oil spillage in this case and cannot, therefore, be held liable under subsection (g). The only provision under which Moran may be held liable is § 1321(h)(2), which preserves for the government nonstatutory remedies against third parties involved in oil spills. Among the remedies preserved by subsection (h)(2) is the government's right to hold a vessel and its owner jointly and severally liable for negligent oil pollution. *United States v. M/V Big Sam*, 681 F.2d 432, 443, *reh'g denied*, 693 F.2d 451 (5th Cir. 1982) (authorities collected).

The threshold issue with regard to Moran's liability to the United States under § 1321(h)(2) concerns Moran's claim that the question of its liability under FWPCA is "moot". Moran asserts that § 1321 contains a hierarchy of remedies for government recovery of the costs of an oil-spill cleanup. According to Moran's argument, the preferred remedies in this hierarchy are found in § 1321(f) and § 1321(g), which respectively provide for discharger and sole-cause third party strict liability; so long as either of these remedies will afford the United States complete reimbursement, the remedies preserved by subsection (h)(2) should not be employed. Thus, Moran claims, because the government's claim for $235,000 is less than ADC's $300,000 limitation fund under §1321(f), the issue of Moran liability under subsection (h)(2) is "moot".

This claim is negated by the plain language of subsection (h)(2): "The liabilities established by this section *shall in no way* affect any right...the United States Government may have against any third party whose actions may in any way have caused or contributed to the discharge of oil or hazardous substance." 33 U.S.C. § 1321(h)(2) (emphasis added). Moran's reliance on *United States v. Bear*

Marine Services, 509 F.Supp. 710, 716-18 (E.D.La. 1980) is not persuasive. In *Bear Marine,* the District Court carefully described the purposes and provisions of § 1321 in denying a third party's motion to dismiss the government's claim for oil-spill cleanup costs brought under maritime tort doctrines preserved by subsection (h)(2). Although silent as to whether the discharger's limitation fund was less than the government's reimbursement claim, the opinion plausibly asserts that subsection (h)(2)'s preservation of nonstatutory remedies was designed to assure the government an alternative source of reimbursement in the event either of the limited liability remedies provided by subsections (f) or (g) proved inadequate. Language in the opinion further suggests that, in light of this statutory design, only those costs not covered by sources available under subsections (f) or (g) may be recovered under the remedies preserved by subsection (h)(2). *Bear Marine,* 509 F.Supp. at 718-19. Such a limitation on the availability of remedies preserved by subsection (h)(2) should not, however, be read into §1321. Although Congress may have preserved nonstatutory remedies in order to assure full government reimbursement in the event the statutory remedies proved inadequate, Congress did not tailor its preservation of nonstatutory remedies to that purpose. As noted, Congress specifically stated that the statutory remedies "in no way affect" existing nonstatutory remedies against third parties.

Moreover, there is no compelling reason why the nonstatutory remedies preserved by § 1321(h)(2) should be unavailable to the govnment whenever the statutory remedies provided by subsections (f) or (g) are adequate. The United States may prefer to move under subsections (f) or (g) in many cases, inasmuch as those strict-liability provisions do not require proof of negligence; if, however,

as in this case, a determination of negligence has already been made as to a third party, there is no reason not to allow the government to proceed separately against the negligent third party for its share of liability under maritime tort doctrines preserved by subsection (h)(2). Indeed, in this case it seems especially appropriate to allow the government to hold Moran, which was 65% responsible for the oil-spill in question, jointly and severally liable with ADC, which was only 35% responsible for the oil-spill. (Of course, if the government elects to demand reimbursement from either ADC or Moran for more than its share of fault, the party that pays for more than its share of fault will have an action for contribution from the party that pays for less than its share of fault.)

The second issue concerning Moran's liability to the United States under subsection (h)(2) is whether that liability is limited by the tonnage formula expressly provided in subsection (g) for strictly liable, sole-cause third parties. This issue has been recently and very thoroughly explored by the Fifth Circuit in *United States v. M/V Big Sam, supra,* which concluded that a third party's liability for negligence under principles of maritime tort preserved by subsection (h)(2) should not be affected by the limitation provision of subsection (g). Without needlessly repeating the detailed analysis contained in *Big Sam,* the plain language of subsection (h)(2) does not call for a judicial transplant of the limitation on strict liability in subsection (g) to the negligence liability of third parties unrestrictedly preserved by subsection (h)(2). *See Big Sam,* 693 F.2d at 454-56 (discussing recent Supreme Court authority on the need to avoid unnecessarily creative judicial interpretations of unambiguous statutory language). Limiting the liability of all dischargers (subsection (f)), as well as strictly liable, sole-cause third parties (subsection (g)), while not

limiting the liability of negligently liable third parties, is not so illogical or irrational as to require judicial reconstruction of §1321. *See Big Sam*, 693 F.2d at 453 n. 5 & 454 n. 8.

Moran incorrectly suggests that under this reading of the statute it will be held liable without limitation only because it was not the sole cause of the oil-spill and thus did not qualify for liability limitation under subsection (g). *See* Moran Memorandum of Law (Dec. 16, 1982) 18. If the statutory language required such a reading, the language might well be deemed sufficiently illogical and irrational to require judicial reinterpretation. It is difficult to imagine any reason why a negligent party 100% responsible for an oil-spill shouldbe entitled to a liability limitation unavailable to a negligent party 65% at fault. The language of § 1321, however, does not require such a reading. A sole-cause, negligent third party may be held liable without limitation under subsection (h)(2) to the same extent that a contributing-cause, negligent third party may be; indeed, the defendant in *Big Sam* was just such a negligent, sole-cause third party liable under both subsection (g) and subsection (h)(2). *See* 681 F.2d at 442.43.

A final difficulty concerning Moran's liability under § 1321(h)(2) is this Court's original finding that Moran is not a "third party" under § 1321(f). Transcript of Trial 1162. In its appellate brief Moran urged that this finding precluded holding it liable as a "third party" under § 1321(h)(2). Moran Appellate Reply Brief (May 21, 1982) 21. The Court of Appeals noted this apparent anomaly in its statement remanding this case. Moran's briefs on remand to this Court, however, do not mention the argument. This Court's finding concerning Moran's status under § 1321(f) was significant only insofar as ADC could have otherwise

avoided its strict liability as discharger by invoking the exception in subsection (f) for oil spills caused solely by a "third party." The Court's finding concerning ADC's 35% responsibility for the oil spill, however, precluded AdC from avoiding liability under any of the exceptions in subsection (f). In short, the finding that ADC was 35% at fault made the finding that Moran was not a "third party" under § 1321(f) irrelevant. Thus the propriety of inconsistently reading "third party" in different subsections of § 1321 is not at issue here because only the use of the term in subsection (h)(2) is involved.

Moran is undoubtedly a third party under subsection (h)(2). As detailed in opinions by the Fifth and First Circuit, a narrow reading of the sole-cause "third party" exception in § 1321(f) is justified by the statute's purpose of assuring government reimbursement for clean-up costs by holding discharging vessels strictly liable. *See United States v. LeBeouf Bros. Towing Co.*, 621 F.2d 787 (5th Cir.) *reh'g denied*, 629 F.2d 1350 (1980), *cert. denied*, 452 U.S. 906 (1981); *Burgess v. M/V Tamano*, 564 F.2d 964, 981-82 (1st Cir. 1977) *cert. denied*, 435 U.S. 941 (1978). This purpose is not served by narrowly construing the reference to "third party" in § 1321(h)(2); rather, a broad construction of the term in subsection (h)(2) serves the purpose of the statute in the same way a narrow reading of the term in subsection (f) does: by providing another source from which the government may attempt to procure reimbursement for clean-up expenses.

III.

In conclusion, ADC may not assert a WOWS claim as a means of avoiding liability for its share of fault, and Moran and the tug *Grace Moran* may be held jointly and

severally liable to the government without limitation under § 1321(h)(2). No costs to any party. The parties are directed to submit a judgment within 10 days incorporating amendments to the Court's previous judgment that are indicated by this Order.

SO ORDERED.

Dated: New York, New York
February 11, 1983

ABRAHAM S. SOFAER
U.S. DISTRICT JUDGE